

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

Ronald Sklansky
Director
(608) 266-1946

Richard Sweet
Assistant Director
(608) 266-2982



David J. Stute, Director
Legislative Council Staff
(608) 266-1304

One E. Main St., Ste. 401
P.O. Box 2536
Madison, WI 53701-2536
FAX: (608) 266-3830

CLEARINGHOUSE RULE 97-013

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

What specific statutory authority exists for agency imposition of civil forfeitures on inmates?

2. Form, Style and Placement in Administrative Code

a. When two or more subsections, paragraphs, subdivisions or subparagraphs of the same rule sections are affected by the same treatment, they may be included in the same SECTION of the rule and the rule section number need not be repeated for each subunit of the section. [See s. 1.04 (2), Manual.] For example, in SECTION 1 of the rule, s. DOC 303.01 need not be repeated each time before the amendments made in subs. (2) and (3). [See also, e.g., SECTIONS 32, 41, 43, 57, 65, 67, 74 to 78, 93, 94, 95, 105, 106, 125 to 128, 138, 144, 146, 147, 151, 152, 168, 169, 179 and 180.] In addition, SECTIONS 25, 26, 27 and 28 of the rule could be combined because subsections of the same rule section are amended. [See also, e.g., SECTIONS 35 to 38, 39 and 40, 52 to 55, 69 to 72, 89 to 92, 99 to 102, 109 to 119, 122 to 123, 128 to 136, 139 to 143, 148 to 150, 155 to 158, 163 to 166, 174, 175, 177 and 178.]

b. Generally, if a rule provision containing a title is amended, the title is shown even if it is not amended [s. 1.05 (3) (d), Manual]. For example, the various subsections of s. DOC 303.05, which are amended by the rule, all contain titles in the current rule, yet no titles are shown in the amendments to those subsections. They should be.

c. In s. DOC 303.01 (1), the phrase “has the authority to” should be replaced by the word “may”; the word “provision” should be replaced by the word “subsection” or “section”; and the word “discipline” should be replaced by the word “disciplined.”

d. In the treatment clause of SECTION 41, “(3)” need not be repeated after its first occurrence.

e. SECTION 43 of the rule, as well as other parts of the rule, uses the term “TLU.” Since the term appears to be used throughout ch. DOC 303, it should be defined in the definition portion of the rule. In addition, although SECTION 43 of the rule purports to amend, among other things, s. DOC 303.11 (2), it appears that it really amends s. DOC 303.11 (3). The rule should be reviewed to ensure that its intent is correctly reflected.

f. Because SECTION 46 of the rule renumbers s. DOC 303.12 as sub. (1), “(1)” need not be underscored.

g. The rule provisions contained in SECTIONS 69 to 72 of the rule all contain an “Exception.” These exceptions should be redrafted so that the exception is grammatically and conceptually complete. For example, the exception in s. DOC 303.26 (3) could be rewritten as follows: “This subsection does not apply to hobby items”

h. The underscoring in s. DOC 303.271 (2) should be solid.

i. The treatment clause of SECTION 82 of the rule could be simplified as follows: “DOC 303.42 (1) (intro.) and (1) (a) to (d) are amended to read:”.

j. The treatment clause of SECTION 84 should refer to s. DOC 303.46 (1).

k. The treatment clause of SECTION 85 should refer to s. DOC 303.47 (2) (a) to (d), since sub. (2) (intro.) is not amended. In addition, the word “is” should be deleted.

l. There are two SECTIONS numbered “95” and no SECTION 96.

m. In s. DOC 303.64 (3) (intro.) and (a), the phrases beginning with “See” should be reworded “as provided under . . .” and included in the sentences immediately preceding them.

n. No amendments are shown in s. DOC 303.67 (4) (a) and (b).

o. There are two SECTIONS numbered “128” and no SECTION 129.

p. In s. DOC 303.68 (1) (a), the notation “\$6-\$10” should be replaced by the notation “\$6 to \$10.” The entire rule should be reviewed for this problem.

q. No part of the title in s. DOC 303.71 (5) should be underscored [s. 1.05 (3) (c), Manual]. This comment also applies to s. DOC 303.72 (8).

r. In s. DOC 303.76 (6), par. (e) is not structurally consistent with the remaining paragraphs.

s. The last sentence of s. DOC 303.81 (5) would be more appropriately placed in a note to the rule.

t. In SECTION 169 of the rule, there is no need to amend s. DOC 303.83 (1) (intro.), because sub. (1) does not contain an (intro.). It appears that s. DOC 303.83 (intro.) and (1) to (10) are amended. The SECTION should be modified accordingly.

u. The use of titles should be consistent in any unit of a rule. The rule creates a title for s. DOC 303.84 (1) (L) when none of the other paragraphs in that subsection have titles. The title should be deleted. If, on the other hand, the title as shown is not intended as a title, it should not be underscored.

v. SECTION 178 of the rule purports to amend s. DOC 303.84 (2) (e). However, no amendment is apparent. This SECTION should be reviewed.

w. In s. DOC 303.86 (2) (b) 1. and 2., the examples should be placed in a note to the rule. See, for example, s. DOC 303.86 (1) (b).

x. In the first sentence of s. DOC 303.86 (4), “~~If~~” should be replaced by “If” and “If” should be deleted.

y. In the amendment to the Note to s. DOC 303.13, the heading “Note: DOC 303.13” should be on a line separate from the amendment to the Note to s. DOC 303.12.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. DOC 303.02 (10), what is an “unsanctioned group”? If there is a formal sanctioning process for prison groups in the Administrative Code or the statutes, an appropriate cross-reference should be provided.

b. Section DOC 303.02 (11) refers to a “prison defined under intensive sanctions.” Where is this definition? An appropriate cross-reference to a related statute or rule should be provided.

c. Based upon changes made in the rule, the reference to s. DOC 303.02 (17) in s. DOC 303.15 (1) (b) should be changed to a reference to s. DOC 303.02 (20).

d. SECTIONS 58 and 61 of the rule make reference to s. DOC 309.22. However, it does not appear that this section presently exists. Is that section created by another rule currently in the rules promulgation process? The reference to this nonexistent section should be explained or corrected.

e. The reference to “the rules” in s. DOC 303.48 (4) should contain a cross-reference to better identify which rules are referred to. In addition, the word “subsection” should be inserted after the word “This” in the second sentence.

f. In s. DOC 303.67 (4) (b), the notation “s.” should be “ss.”, as it is in the current rule.

g. The cross-reference in s. DOC 303.69 (8), relating to mechanical restraints, appears to be incorrect. The correct cross-reference appears to be s. DOC 303.09 (1).

h. Section DOC 303.73 (5) relates to sending mail according to departmental rules. The rule should provide an appropriate cross-reference to the departmental rules relating to sending mail. [See also s. DOC 303.69 (12) (b) and (c).]

i. In s. DOC 303.84 (1) (L), a reference to the schedule of forfeitures should be inserted after the phrase “only the \$1-5.00 amount” in the second sentence.

j. Section DOC 303.84 (2) (g) refers to an “administrative rule.” This reference should be made more specific, such as “in this chapter” or “in ss. DOC ____ and ____.”

k. In the amendment to the Note to s. DOC 303.70, the STEP program is referred to. What is this program and is there an appropriate cross-reference that can be provided? If so, the rule should be amended accordingly.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. DOC 303.01 (1), it is not clear what is meant by “another jurisdiction.”

b. It is not clear from s. DOC 303.02 (17) what the last phrase of that subsection means. The relevance of what it means to be “an activity” should be clarified in the rule through the use of a note or the use of an appropriate cross-reference to an offense requiring that possession be an “activity.” In addition, for purposes of clarity, it would be helpful to replace “~~or~~” with “or,” end the sentence after “control” and begin a second sentence with the phrase “Possession is considered”

c. The phrase “the warden’s” should be inserted between the words “or” and “designee” in s. DOC 303.02 (23).

d. The two dashes after the word “condition” in s. DOC 303.02 (24) (c) should be changed to a comma.

e. In s. DOC 303.05 (1), the phrase “alleged to have been violated under this chapter,” or a substantially similar phrase should be added after the word “sections” in order to better identify the sections being referred to.

f. In s. DOC 303.06 (1) (intro.), the word “all” should be deleted. In addition, par. (a) should be clarified to better identify when the rule violation would have occurred. For example, the “something” that was intended would have been a rule violation if actually committed by the inmate. Finally, in par. (b), the phrase “at that time” should be replaced by the phrase “when the acts occurred.”

g. In s. DOC 303.07 (1) (c), what does “this” refer to? The assistance or the offense? The rule should be clarified.

h. In s. DOC 303.10 (1) (a), the phrase “for example” should be replaced by the word “including.”

i. In s. DOC 303.10 (3) (d), what is the distinction between the “owner” of property and the “true owner” of property? The distinction should be clarified. If there is no distinction, the rule should use consistent terminology.

j. Section DOC 303.11 (6) refers to “corrections industries.” Chapter DOC 313, however, refers to “Prison Industries.” Are these the same? If so, it would seem appropriate to use the term “prison industries” in ch. DOC 303, as well.

k. Can it be properly inferred from s. DOC 303.12 (2) that throwing some form of identified substance that is not spit, body fluid or waste, is not a separate offense?

l. The phrase “even while clothed” in s. DOC 303.15 (1) (f) should be replaced by the phrase “whether clothed or unclothed.”

m. In s. DOC 303.20 (2) (d) the phrase “for example, to” should be replaced by “including.”

n. It is not clear why, in light of the definition of “possession” contained in s. DOC 303.02 (17) and the plain language of s. DOC 303.20 (3), the second sentence of s. DOC 303.20 (3) is necessary. If it is necessary, it should be clarified to provide that the possession being referred to is possession of gang literature, creed, symbols or symbolisms. Also, what is meant by the phrase “may be viewed as”? Is hair sculpturing an “unsanctioned group activity” or is such a decision left up to the institution staff on a case-by-case basis? The rule should be clarified.

o. In s. DOC 303.21 (1), the word “forbidden” should be replaced by the word “prohibited.”

p. The phrase “some conduct” in s. DOC 303.25 is vague. Who decides which conduct within treatment groups constitutes disrespect? The rule should be clarified.

q. In light of the definition of “public” provided in s. DOC 303.02 (18), the phrase “sale to the public” in s. DOC 303.26 (3), does not make much sense. Perhaps it would be possible to provide a more narrow definition of “public” which would only apply in certain situations. For example, the phrase “public expressions” could be defined for purposes of s. DOC 303.25 to be expressions made outside of the formal complaint process.

r. In s. DOC 303.271 (3), the addition of the word “the” in the second sentence does not add clarity to the rule. Which supervisor is to be contacted? The rule should identify which supervisor should be contacted. If the staff member is to contact his or her supervisor, the phrase “his or her” could be retained or the phrase “the staff member’s” could be used.

s. It appears that s. DOC 303.41 is incomplete. Is an inmate who does any of the acts described guilty of an offense or something else?

t. Section DOC 303.43 (1) is unclear. Is the possession of approved glue or cough syrup acceptable or not? Perhaps changing the phrase “to include” to “including” would help clarify the rule’s intent.

u. Section DOC 303.48 (5) is unclear. Is there a difference between mail and correspondence? Or is someone who sends correspondence guilty of an offense? This subsection needs to be clarified.

v. In s. DOC 303.48 (6), the phrase “including pubic hair” should be set off by commas.

w. In s. DOC 303.49 (intro.), the phrase “and the like” should be replaced by a more appropriate phrase like “and similar activities.”

x. In s. DOC 303.60 (3), the term “etc.” should be replaced by a more appropriate term or phrase, such as “or other form of gambling.”

y. In s. DOC 303.63 (1) (L), the word “institutions” should be singular.

z. The rule should avoid the use of vague terms such as “recently” in s. DOC 303.65 (1) (b). Instead, a specific period of time should be set forth in the rule.

aa. In s. DOC 303.66 (2), what sections are being referred to? Sections of ch. DOC 303? The rule should be clarified.

ab. In the table in s. DOC 303.68 (3), “Paraphrenalia” is misspelled.

ac. The amended portion of s. DOC 303.68 (5) is unclear. “Once what” is classified as a major offense? Also, what is “any decision”? The intent of this provision should be clarified and drafted accordingly.

ad. The second sentence of s. DOC 303.69 (1) should be rewritten in substantially the following form: “An inmate who has served 8 consecutive days in adjustment segregation shall be released from adjustment segregation for one day and allowed any program segregation privileges under ____ or any disciplinary separation privileges under ____ that may apply to the inmate.” Additionally, the word “It” at the beginning of the third sentence should be replaced by “Adjustment segregation.”

ae. The word “necessarily” in s. DOC 303.69 (2) is vague. Who determines whether something can be kept in the cell and upon what basis is the decision made? Also, in par. (c), a period should be inserted after the word “pens” and the word “the” following “pens” should be capitalized. Finally, to be consistent with other paragraphs in the subsection, par. (e) should be begin with the phrase “Adequate meals,” or a similar phrase. These last two sentences also apply to s. DOC 303.70 (2) (c) and (e).

af. In the first sentence of s. DOC 303.69 (12) (a), the word “segregation” should be inserted before the word “starts.” What does the word “It” at the beginning of the second sentence refer to? Finally, in light of s. DOC 303.69 (1), the last two sentences of sub. (12) appear to be redundant. If they are, they should be deleted.

ag. Paragraphs (b) and (c) of s. DOC 303.69 (12) are unclear. First, appropriate cross-references to the provisions of the rules relating to program segregation and disciplinary separation should be provided. Second, why are these provisions located in the section on adjustment segregation? Is the intent of the rule to provide that program segregation is to be served concurrently to all other segregation or separation time, and that disciplinary separation is to be served concurrently with all other segregation statuses? Also, see s. DOC 303.73 (13).

ah. In s. DOC 303.71 (1), what is meant by “normally lasts”? It would seem appropriate to replace this phrase with a phrase such as “may be ordered.” Also, in the last sentence, the phrase “this status” should be replaced with the phrase “controlled segregation.”

ai. The word “They” in the second sentence of s. DOC 303.71 (6) (b) should be replaced with the phrase “Inmates in controlled segregation.”

aj. In s. DOC 303.71 (7), the word “shall” should be inserted after the word “segregation” and the word “earns” in that sentence should be singular.

ak. In s. DOC 303.72 (3), “40” should be inserted after “~~a maximum of~~” to reflect the current rule.

al. The word “This” in the second sentence of s. DOC 303.72 (5) should be replaced by “Restitution.”

am. In s. DOC 303.73 (1) (intro.), the word “It” in the second sentence should be replaced by “Disciplinary separation.” The phrase “overcrowding prevents” should be replaced by “overcrowding at the institution requires otherwise.” This last sentence also applies to ss. DOC 303.69 (1) (intro.) and 303.70 (1) (intro.).

an. In s. DOC 303.73 (8), the word “They” at the beginning of the second sentence should be replaced by the phrase “Inmates in disciplinary separation.”

ao. In s. DOC 303.73 (9), the phrase “do not” should be replaced by the phrase “may not.”

ap. The word “must” in the second sentence of s. DOC 303.73 (12) (intro.) should be replaced by “shall be” and the phrase “all of the following” should be inserted immediately before the colon in the last sentence.

aq. In s. DOC 303.73 (12) (a) 2. and 3., the word “factor” should be plural.

ar. In s. DOC 303.73 (12) (b), the word “inmate” should be replaced by the word “inmates.”

as. In s. DOC 303.73 (12) (c) (intro.), the period should be replaced by a colon.

at. In s. DOC 303.73 (13), the word “time” should be inserted after the second and third occurrences of the word “program.”

au. In s. DOC 303.74 (7) (intro.), a comma should be inserted before the word “both” in the first sentence and the word “earning” in the second sentence should be made plural. In pars. (a) and (b), the word “offense” should be inserted before the colon. This last sentence also applies to the schedule in s. DOC 303.84 (1) (L).

av. The meaning of “on visit” in s. DOC 303.74 (9) (b) should be clarified.

aw. In its attempt to avoid application of *State ex rel. Jones v. Franklin*, 444 N.W.2d 738 (Ct. App. 1989), it seems that the rule unnecessarily complicates s. DOC 303.75 (2). Instead of adding the vague language providing that the hearing “should not” be held later than 21 days after the conduct report is given, and including the sentence providing that the 21-day limit is

not jurisdictional, the same effect could be achieved by simply providing that the security director (or adjustment committee) may extend the 21-day limit for cause, as the rule does in the fourth sentence. This comment also applies to s. DOC 303.76 (3).

ax. In s. DOC 303.76 (1) (e) 4., the word “forbid” should be changed to “prohibit.” This comment also applies to s. DOC 303.76 (5) (e).

ay. In s. DOC 303.76 (7) (c) 3., the phrase “all or in part” should be replaced by the phrase “in whole or in part.” In addition, the subdivision provides that even if the decision is reversed in part, all records of the decision must be removed from the offender-based files. Is this the rule’s intent?

az. In s. DOC 303.81 (8), the phrase “should be” ought to be replaced by the phrase “shall be.”

ba. In the first sentence of s. DOC 303.82 (1), the term “a” should be “an” and the word “adjustment” inserted before “committee.”

bb. In s. DOC 303.82 (2), the phrase “should find out” in the second sentence should be changed to “shall determine.”

bc. In s. DOC 303.83 (9), the phrase “and the like” should be replaced by a more appropriate phrase that adequately describes the other factors that may be considered.

bd. In s. DOC 303.84 (1) (i), a comma should be inserted after “150.”

be. On page 53 of the rule, the table heading “Offenses against and health” appears to be missing the word “safety.”

bf. In the amendment to the Note to s. DOC 303.26, it appears that sentences 4 and 5 are in paragraph 1. This should be made clear in the amendment.

bg. In the amendment to the Note to s. DOC 303.27, what other paragraph is deleted?

bh. In the amendments to the Notes to ss. DOC 303.34 and 303.35, what paragraphs are the sentences deleted from?

bi. In the amendment to the Note to s. DOC 303.40, the phrase “to read” should be deleted from the second sentence. Also, what paragraph is the amended sentence 5 located in?

bj. In the amendment to the Note to s. DOC 303.64, the extra comma between 4 and 7 should be deleted.

bk. In the amendment to the Note to s. DOC 303.72, it appears that paragraph 1 only has three sentences. Thus, sentence 4 cannot be amended.

bl. In the third sentence of the amendment to the Note to s. DOC 303.73, what does the word “there” refer to? Also, the phrase “By law” in the last sentence should be better identified by an appropriate cross-reference.

bm. In the current Note to s. 303.76, the reader is asked in paragraph 4 to “See s. DOC 303.75 and Note.” The amendment in the rule changes the cross-reference to s. DOC 303.77 but is silent on the Note. The amendment needs to address the reference to the Note. In addition, the language added to paragraph 4 should all be underscored because the paragraph is being amended. Also, in the case citation, the term “Wis.” should be followed by “2d.”

bn. It appears that the second amendment to the Note to s. DOC 303.81 is really an amendment to the Note to s. DOC 303.82.